Everything you need to know about Article 50 (but were afraid to ask)

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Andrew Duff Mo 4 Jul 2016

Most people will have never read a single article of the Treaty on European Union (TEU) before they stumbled recently across Article 50. Alas, those 'most people' seems to include many British lawyers and politicians whose acquaintance with the constitution of the European Union has been hitherto remote. So here is my guide to Article 50.

The need to include a secession clause in the Constitutional Treaty (2003) and then the Treaty of Lisbon (2007) was upheld both by the federalists and by their opponents. Federalists saw the need to have a safety clause in the new treaty that would allow a let-out for any current member state which fought shy of accepting the leap forward in European integration that was at that time postulated. The UK government, aware of the risky nature of its ever-increasing exceptionalism, wanted a clause that would prevent the abrupt expulsion of an awkward member state by the mainstream majority. That said, none of us in the Convention ever expected the provision actually to be used – which might explain its relatively sketchy character. So it is vital to analyse very carefully what the clause says, why it says it, and how it is now to be deployed.

Article 50(1) says:

> *Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*

The European Court of Justice (CJEU) could well be asked to verify that the UK has acted 'in accordance with its own constitutional requirements'. It will look at the British EU Referendum Act 2015, which legislated that a referendum 'is to be held' on whether the UK should remain a member of the EU.[1] No threshold was set either for turnout or for a qualified majority. Although it is said by in-denial Remainers that the referendum was 'merely advisory', the Act made no stipulation for the UK Parliament to approve, deny or second-guess the outcome of the referendum. The CJEU will note that the majority at 3.8% was clear and the turnout at 72.2% was higher than that of the 2015 general election. There have been no allegations of electoral fraud.

Those who seek refuge in the classic argument that the Westminster parliament is sovereign in all things must answer the question why, in that case, it passed the buck to the hapless people on the matter of EU membership. The European Court will be seized of the British prime minister's powers under royal prerogative to invoke Article 50 as and when he/she chooses to do so. It will take no view as to whether it would be prudent for the new prime minister, who is scheduled to take office on 9 September, to seek an affirmative vote of the Commons or even to enact legislation on the matter of invocation.

But it is not just UK law which empowers the prime minister to act but also EU law, which in this case has primacy. The CJEU would be able to insist that the British prime minister, as a member (for the moment) of the European Council, is duty bound to trigger Article 50 which, by virtue of the European Communities Act 1972, has direct effect on him or her. A failure to fulfil his or her obligation would open up the UK to attack at the CJEU, as would a failure to act on Brexit on behalf of the European Council as a whole.

Article 50(2) says:

> *A Member State which decides to withdraw shall notify the European Council of its intention. In*

> *the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*

From this we may conclude two basic points. First, Article 50 concerns the nature of a 'withdrawal agreement' and the process by which it is concluded. Second, that agreement shall take into account 'the framework' of any future relationship between the EU and the seceding state. So two distinct objectives are postulated:

(1) A set of transitional arrangements on things that have to be done to extricate the UK from its EU rights and obligations; and

(2) The outline of something unspecified on some future kind of UK EU policy.

Unhelpfully, much of the argument in Britain at the moment conflates these two separate things.

The withdrawal agreement, first, has to address a large number of fairly technical issues. These will include:

- ending UK contributions to and receipts from the EU budget, including the winding down of EU spending programmes in the UK;
- catering for the acquired rights of British nationals resident in other EU states, and of EU citizens living in the UK;
- managing the withdrawal of British civil servants working in the EU institutions, including the unpicking of the European External Action Service;
- preparing for the exit of British members from the European Parliament, European Court, Committee of the Regions, Economic and Social Committee, etc.;
- relocating EU agencies out of the UK – notably the hotly sought-after European Banking Authority;
- drawing down UK military involvement from common security and defence policy missions, pulling UK police out of Europol and ending engagement in Frontex;
- establishing new forms of frontier control, not least at Britain's land borders in Northern Ireland and Gibraltar.

Secondly, taking into account the future framework may involve outlining the objectives of a trade deal between the UK and EU 27. Such a thing, however, will have to be negotiated in full not under Article 50 TEU but under Articles 216 or 217 TFEU. Bearing in mind that the Brexiteers appear still to be very uncertain as to what it is they would prefer, references to the future settlement may have to be left suitably vague. To keep options open, it is worth bearing in mind that a future revision of the EU treaties may provide for the UK a wholly new category of affiliated membership of the EU short of full membership (Article 49 bis TEU). What is clear, however, is that the future partnership, if any, is to be assigned to a separate and later negotiation. Even if talks start informally before the Article 50 agreement is concluded, their formal progress will take longer to conclude. Indeed, the European Council at its meeting on 28-29 June has made it clear that such a formal negotiation cannot start until such time as the UK has left the EU and attained third country status.

The Article 50 exercise itself will be to a large extent the converse of how a state joins the EU. Just as accession (under Article 49 TEU) is not so much a negotiation between the candidate country and the EU but more the assimilation of the *acquis communautaire* and verification of conformity with the Copenhagen criteria, the secession process will be about cutting the ties that bind the UK to the constitutional order of the EU after 43 years of integration. It is a complex business, even poignant, but it is fairly straightforward.

The agreement will need to record the matters that will then be left to the EU and the UK to execute in detail subsequently and respectively. For its part, the EU legislature will have to shrink its budget and adjust its

institutions – such as the re-apportionment of the UK's 73 seats in the European Parliament (one hopes to a transnational list). EU treaty amendment and other adjustments to primary law are unavoidable. The UK government and parliament, for their part, will be engaged for years with filleting the laws they have previously enacted that transposes EU law into the domestic arena. Much will need to be repealed quickly, including the European Parliament Elections Act 2002. For the sake of legal certainty, the EC Act 1972 will surely have to be ditched to coincide with the entry into force of the Article 50 withdrawal agreement.

There is press speculation of a turf war in Brussels between the European Council and Commission about the conduct of the Article 50 exercise. This is unnecessary. The European Council will establish the mandate for the Commission to do the detailed work on behalf of the EU. The very capable Didier Seeuws has been appointed to run a special Council committee to oversee the process, including the reflection on any future framework, but the heavy-lifting on secession will be done by the Commission. The appointment of Seeuws neatly takes responsibility away from the next rotating presidencies of the Council of Ministers – including the eurosceptical Slovaks and the untried Maltese and Estonians (whose presidency has to be brought forward to fill the gap vacated by the UK from July 2017).

Article 50(3) says:

> *The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*

The imposition of the guillotine has two purposes. First, it will prevent the UK from endless procrastination and prevarication – a useful precaution, indeed, in present political circumstances. For the EU 27, already bruised by David Cameron's sham 'renegotiation' extracted from the European Council in February, further delay and uncertainty is unacceptable.[2] In one sense, Brexit is just an enormous distraction from dealing with the other crises that now confront the Union. The departure of the British may make it easier to address at least some of those questions, notably deeper fiscal integration in the eurozone.[3] Likewise, EU accession to the European Convention on Human Rights.

From the British point of view, the timetable of two years gives a decent breathing space. It is not possible for the UK to be ejected peremptorily from the EU by its aggrieved partners. Within that two year period – for instance, following a British general election and change of government or, less likely, after a second referendum - it would be perfectly possible for the UK to revoke its decision to quit. That Article 50 is silent on the matter of revocation does not mean that a change of direction would be illegal under EU law (as long as the CJEU were convinced that the switch was constitutional). The EU is well practised in the art of the stopped clock. Given the collateral damage done to the remaining EU by Brexit, a notification that London had changed its mind would be met with very great, if somewhat exasperated relief.

Article 50(4) says:

> *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*
>
> *A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*

Clearly, the cards are stacked in favour of the EU 27 – as the EU 27 summit meeting on 29 June duly affirmed.

Brexit will not be made easy; and the UK cannot expect better conditions as an ex-member state than it had as a full member state. The UK is to be deprived of its full rights as a member state, as was reflected by the prompt resignation of Jonathan Hill as a member of the European Commission. The depletion of credibility of the remaining Brits in Brussels, not only within the Council, will be illustrated in a number of ways, big and small, over the course of the next weeks and months.

The qualified majority needed in Council to approve the withdrawal agreement will be 20 out of the 27 states. The withdrawal agreement will also have to be approved by the UK parliament as well as by the European Parliament (when British MEPs will retain full voting rights). But it is not envisaged that the EU 27 will have to submit necessarily the agreement to their own national parliaments for ratification or, God forbid, to referendums. That is why a narrow, technical and fairly swift agreement such as we have described here is much preferable to a wider and longer negotiation that attempted to embrace a full, final settlement of the EU UK relationship: such a thing would be a mixed agreement under the terms of Article 218 TFEU, and would certainly be subject to unanimous ratification by all 27 states, running the gauntlet of veto.

Finally, Article 50(5) says:

> *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

This confirms what upsets the in-denial Remainers: out means out. And that applies, of course, not only to the UK as a whole but to any constituent part of it that chooses to break away: an independent Scotland would have third country status as far as the EU is concerned, albeit with important legacy attributions that would favour its own swift accession as the EU's 28th member state.

Goodbye to all that

The principal objective of EU 27 at this perilous time is to maintain the integrity and cohesion of the Union. Delay in triggering Article 50 will accentuate the risk that the British contagion spreads to other states, notably the Visegrad Four. Brexit is already being exploited by anti-European forces across the Union: and in 2017 the Netherlands, France, Germany and possibly Italy all face critical national elections. The longer the new British prime minister delays invoking Article 50, the more will Europe's political and constitutional crisis escalate. Cameron's legacy is to have ruined the United Kingdom; his successor should not risk the charge that they ruined Europe too.

The democratic legitimacy of the Union depends on the continual strict application of the rule of EU law. While Article 50 means that the UK remains a member state and subject to EU law until such time as it departs, it has already lost its political (and some would say moral) credibility. The new prime minister cannot dodge the fact that Article 50 is the only legal way for the UK to secede and that he or she, therefore, has a duty to pull the trigger. Not to deploy Article 50 would result in an even more disorderly situation than we have now. Leaving in any other way – for instance, by repealing the European Communities Act 1972 and unilaterally abrogating the UK's EC Accession Treaty – would amount to a breach of both EU and international law. The Vienna Convention on the Law of International Treaties (1969) lays down several conditions under which a state may resile from its treaty commitments to an international organisation – and none of them are met in the case of Brexit.

Article 50 it is. And if it were done, it were best done quickly.

[1] In the notorious EU Act 2011, which installs referendums as a matter of course for most changes to the EU treaties, neither secession in general nor Article 50 in particular is mentioned.

[2] See my *Britain's Special Status in Europe: a comprehensive assessment of the UK-EU deal and its consequences*, Policy Network, Match 2016.

[3] See my *The Protocol of Frankfurt: a new treaty for the eurozone*, European Policy Centre, January 2016.

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